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No. 75-1372

In the Supreme Court of the United States

OCTOBER TERM, 1975

DONALD E. MULES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1976 (Pet. App. A. 1 to A. 2), and a petition for rehearing was denied on February 24, 1976 (Pet. App. A. 3). The petition for a writ of certiorari was filed on March 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain of the prosecutor's comments, questions, and closing arguments denied petitioner a fair trial.

2. Whether the court properly instructed the jury on the *mens rea* required for a criminal violation of the narcotic inventory requirements of 21 U.S.C. 842(a)(5).

3. Whether petitioner's conviction for furnishing fraudulent information in and omitting material information from records required to be kept by law was improper in light of the fact that the records themselves were not voluntarily "furnished" to the government.

4. Whether the evidence was sufficient to show that certain notations petitioner made on a bottle label were "dispensing records."

5. Whether the indictment was defective because it did not charge that certain fabrications were "material" to a matter "within the jurisdiction" of a federal agency, and whether petitioner's conduct as charged violated 18 U.S.C. 1001.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of failing to maintain an accurate record of cocaine distributed to him for use in his veterinary practice, in violation of 21 U.S.C. 842(a)(5) (Count 1); of failure to maintain accurate cocaine dispensing records, in violation of 21 U.S.C. 842(a)(5) (Count 2); of furnishing fraudulent information concerning his use of cocaine in records required to be kept by law, in violation of 21 U.S.C. 843(a)(4) (Counts 6 and 8); and of making false and fraudulent representations to agents of the Drug Enforcement Administration, in violation of 18 U.S.C. 1001 (Counts 4 and 7). Petitioner was sentenced to one year's imprisonment on Counts 1 and 2 and three years' imprisonment on each of Counts 4, 6, 7, and 8. All terms run concurrently. The court of appeals affirmed *per curiam* without opinion.

The material facts are not in dispute. Agents of the Drug Enforcement Administration conducted a routine inspection of petitioner's offices on August 30, 1973. They questioned him concerning his use of cocaine in his veterinary practice, his maintenance of the statutorily required

records documenting his receipt and dispensation of cocaine, and the amount of cocaine then on the premises. Petitioner stated during the interview that he kept no inventory or dispensing records; however, when showing the agents a five-ounce bottle containing his current stock of cocaine, petitioner claimed that he made handwritten notations on the label to keep track of the amount of cocaine removed from the bottle.

The agents asked petitioner to produce copies of the order forms with which he had obtained cocaine from a local pharmaceutical firm during the past two years. Petitioner produced only six such forms, although federal records indicated that petitioner had placed substantially more than six orders during that period. Petitioner also told the agents that he used cocaine as an ingredient in three different medical preparations, and he specified the exact amounts of the drug used in each. Petitioner repeated these figures to one of the agents during a telephone conversation on September 17, 1973.

Subsequent investigation revealed that petitioner had in fact maintained the inventory records requested by the agents (but denied to them) on August 30, that the handwritten notations on the bottle of cocaine were inaccurate, and that his statements to the agents regarding the amounts of cocaine used in the three medical preparations were false. These misrepresentations were the subject matter of Counts 4 and 7 of the indictment. The inaccurate bottle label notations formed the basis of Count 6.

In April 1974, pursuant to a search warrant, agents seized from petitioner's offices treatment records and controlled substances order forms, all of which were required to be kept by law. Other similar records then in the possession of petitioner's attorney were furnished in response to a subpoena. These were the materials which petitioner had denied existed during the August 30 visit.

They were found to contain serious inaccuracies and material omissions and were the subject matter of Count 8 of the indictment. Petitioner's general failure to keep complete and accurate records of his purchases and use of cocaine, as required by 21 U.S.C. 827, led to his conviction on Counts 1 and 2.

ARGUMENT

1. Petitioner contends that certain of the prosecutor's questions, comments, and closing arguments denied him a fair trial.

a. On direct examination Anthony B. Buck, the veterinary supplies distributor from whom petitioner ordered cocaine, testified that most of his company's dealings in controlled substances involved the distribution of barbiturates to veterinarians who used the drugs for "euthanasia." The prosecutor's attempt to elicit from the witness a definition of "euthanasia" produced the following exchange (Tr. 38-39):

Q:	By euthanasia, you mean when an animal has to be - - -
MR. COVAHEY:	[defense counsel] Your Honor, I would object for the interest of expcdiency.
THE COURT:	He's got to paint some background, counsel.
MR. COVAHEY:	Very well, Your Honor.
MR. RADDING:	[the prosecutor] What are you afraid of, Mr. Covahey?
BY MR. RADDING:	
Q:	What is euthanasia?

MR. COVAHEY:	Your Honor, I would move that the jury be instructed to disregard his statement as to what I am afraid of that he made.
THE COURT:	All right. All right. Go on.

Petitioner apparently contends (Pet. 16) that the prosecutor's rhetorical question implied to the jury that defense counsel was "afraid" because he knew his client was guilty. However, when read in the context of the entire exchange, the prosecutor's remark could not have been so construed. At the time defense counsel raised his objection, the prosecutor was attempting to develop background information concerning matters unrelated to petitioner's guilt or innocence. It would thus be unreasonable to conclude that the jury found this remark relevant to any of the ultimate issues in the case. In any event, the court granted defense counsel's request for a curative instruction and later in the trial issued a clear admonition to the jury to ignore this sort of bickering between counsel (Tr. 1342).

b. Petitioner also objects (Pet. 7-8, 16-17) to certain of the prosecutor's questions during cross-examination of petitioner. But the trial court adequately dealt with these questions by sustaining defense counsel's objections to three of them (petitioner answered before the court could rule on defense counsel's objection to the fourth) (Tr. 1098, 1121-1122, 1289) and by instructing the jury on at least two occasions that the remarks of counsel were not evidence and should be disregarded (Tr. 1342, 1744-1746).

c. Petitioner asserts that he was prejudiced by the prosecutor's two attempts to elicit testimony that one of petitioner's associates had been arrested for possession of cocaine (Pet. 8-9, 16). These attempts, however, were

unsuccessful. The trial court sustained objections to the questions and, in its final charge, instructed the jury "to concern yourselves only with the offenses before you and any other inferences concerning [petitioner's] conduct or anybody closely associated with him are not to be considered" (Tr. 1787-1788).

d. Petitioner urges (Pet. 9-10) that certain of the prosecutor's comments during closing argument (to which counsel did not object at trial) were improper. The record shows that the prosecutor did not exceed the bounds of proper argument.

Petitioner first objects to the prosecutor's statement (Arg. Tr. 8)[1] that "[w]hen you're dealing with narcotics, the most dangerous drugs known to man, you've got to follow what the Government says. Of course, if you don't, we're all in trouble, and I would urge upon you that's what has happened here." When read in context, these remarks did not suggest, as petitioner apparently argues, that the jury has a duty to agree with the prosecutor's argument. Rather, "what the Government says" referred to the Drug Abuse Control Act's record-keeping regulations, and "you" referred to petitioner. The argument was made in response to the thrust of petitioner's defense, which was that he had not thought that the record-keeping requirements were important and therefore had not kept accurate records. See also Arg. Tr. 2-5.

Petitioner also objects to the prosecutor's statement (Arg. Tr. 11-12) that "I can tell you, from my experience as a criminal lawyer and prosecutor that very few people who commit crimes really expect to be caught, and they always feel they're smart enough to outsmart the law." The jury could not, however, have interpreted the remark

[1]"Arg. Tr." refers to the transcript of excerpts from closing arguments on December 18, 1974.

as an invitation to rely upon the prosecutor's experience in assessing petitioner's guilt. The prosecutor made it clear that he was responding to defense counsel's argument that, if petitioner had known about the government's record-keeping requirements, he would not have been "stupid enough to falsify or not fill [the records] out" (Arg. Tr. 11).

Finally, petitioner contends that the prosecutor improperly vouched for the credibility of a government chemist's testimony in the following portion of his closing argument (Arg. Tr. 14):

> These people are professionals. They work for the United States Government. Like myself, like anybody else who works for the Government, they're paid every other Friday, whether or not they make a case, whether or not they testify in Court, whether or not there is a conviction, whether or not somebody goes to jail, it doesn't matter.
>
> They have no ax to grind. They have nothing to prove.* * *

The prosecutor was attempting to rehabilitate the chemist's credibility in response to defense counsel's suggestion (Tr. 310) that the chemist had been paid to testify. The argument was proper.

2. Petitioner argues (Pet. 22-25) that the trial court misinstructed the jury on the state of mind required for a criminal violation of 21 U.S.C. 842(a)(5). He contends that the government must show that he committed the record-keeping offenses charged in Counts 1 and 2 "wilfully * * *, and with the specific intent to do something the law forbids, that is to say, with bad purpose, either to disobey or to disregard the law" (Pet. App. A. 4).

The statute does not require a showing of bad motive. 21 U.S.C. 842(c)(2)(A) states that a person may be held

criminally liable for violations of Section 842(a) if those violations were committed "knowingly." Terms such as "wilful" and "bad purpose" do not appear in the statute.[2] Thus, the court properly instructed the jury that a verdict of guilty on Counts 1 and 2 must rest upon a finding that petitioner "acted knowingly * * * [with] knowledge of all the underlying facts, including the existence of the record keeping requirements, and that he acted voluntarily and deliberately in failing to keep" the pertinent records (Tr. 1764, 1770).

3. Petitioner urges (Pet. 20-21) that he did not "furnish" false and fraudulent records within the meaning of 21 U.S.C. 843(a)(4), as charged in Count 8, because the government used a search warrant and a subpoena to obtain those records. But the statute prohibits the furnishing of "false or fraudulent material *information in* * * * any * * * record" required to be kept (emphasis added). Petitioner placed false information into records that he was required to maintain. The means by which the government obtains the records themselves is irrelevant to the actor's liability.

4. Petitioner contends (Pet. 18-19) that the notations found on the cocaine bottle label during the August 30, 1973, regulatory inspection were not "dispensing

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[2]Petitioner's reliance (Pet. 22-23) on cases construing 18 U.S.C. 871, which requires that the offense described therein must be committed "knowingly and willfully," is therefore misplaced.

Petitioner apparently construes the language in 21 U.S.C. 842(a) that "[i]t shall be unlawful" to commit the enumerated acts as requiring a showing of wilfulness. But if Congress had intended the introductory phrase to have such an effect, it would have been unnecessary to include in Section 842(c)(2)(A) a requirement of showing of "knowledge." Petitioner's construction also would render meaningless the distinction drawn in Section 842(c) between civil and criminal violations of Section 842(a).

records" and that, as a result, his conviction on Count 6 cannot stand.

The question whether petitioner made these notations as "dispensing records" was properly submitted to the jury after careful instruction from the court (Tr. 1780).[3] Agent William Miller testified at trial that petitioner produced the bottle label after the inspecting agents had requested to see his dispensing records, and that petitioner claimed that the notations on the label accurately documented his use of cocaine (Tr. 99-103). Moreover, Agent Randolph Harper testified that the notations included all of the information required to be kept in dispensing records (Dec. 4, 1974 Tr. 82). Thus, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), there was sufficient evidence from which the jury could conclude that the notations constituted dispensing records.

5. Petitioner alleges (Pet. 25-29) that Counts 4 and 7 of the indictment, charging violations of 18 U.S.C. 1001, were fatally defective on two independent grounds. Petitioner also argues (Pet. 29-33) that the conduct alleged in Counts 4 and 7 was not properly punishable under 18 U.S.C. 1001. There is no need for this Court to review these claims. The sentences imposed on those counts were equal to and concurrent with the sentences imposed in connection with petitioner's unquestionably valid convictions on Counts 6 and 8. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. In any event, these claims are incorrect.

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[3]The notations are "dispensing" records under 21 U.S.C. 802(10) and 827(a)(3) if they reflect a transfer of a controlled substance to an "ultimate user." Petitioner himself testified that he administered cocaine to animals, making him an "ultimate user" under 21 U.S.C. 802(25). The question whether the bottle notations were "dispensing records" therefore became one of fact, turning, as the court instructed the jury, upon the purpose for which they had been made.

a. Petitioner contends (Pet. 28-29) that the indictment was defective because it does not contain an explicit allegation that his false statements concerned matters "within the jurisdiction of any * * * agency of the United States" (18 U.S.C. 1001). But an indictment need not charge each element of the crime in the exact words of the statute. It is enough that the required allegations may be fairly implied from the language employed in the indictment. *United States* v. *Barbato*, 471 F. 2d 918, 921 (C.A. 1); *United States* v. *Silverman*, 430 F. 2d 106, 111-112 (C.A. 2), certiorari denied, 402 U.S. 953. Counts 4 and 7 specifically identified petitioner as a "DEA Registrant," that is, one who is subject to that agency's regulatory jurisdiction governing the medical use of controlled substances.[4] The person to whom petitioner was alleged to have made the fraudulent misrepresentations was identified in each count as "an Agent of the Drug Enforcement Administration." Thus, when read as a whole and interpreted in a common sense manner (*United States* v. *Hand*, 497 F. 2d 929 (C.A. 5)), each count adequately charged that petitioner made false and fraudulent statements concerning matters within the jurisdiction of the Drug Enforcement Administration.[5]

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[4]The indictment is set out at Pet. App. A. 6 to A. 10.

[5]Neither *Rolland* v. *United States*, 200 F. 2d 678 (C.A. 5), certiorari denied, 345 U.S. 964, nor *Friedman* v. *United States*, 374 F. 2d 363 (C.A. 8), conflicts with the decision below, as petitioner apparently claims (Pet. 28-29). The indictment in *Rolland* was dismissed on the ground, *inter alia*, that it failed to allege sufficient facts from which an allegation of "materiality" could be implied. In *Friedman* the court dismissed the indictment after deciding that, although the indictment sufficiently alleged that the false statements concerned matters "within the jurisdiction of the Federal Bureau of Investigation," the Bureau's general investigative jurisdiction over violations of the criminal law was not the sort of "jurisdiction" covered by 18 U.S.C. 1001.

b. Petitioner also contends (Pet. 25-28) that Counts 4 and 7 were insufficient because they failed to allege specifically that the false statements were "material." But the defect, if any,[6] is not fatal because it did not deprive petitioner of any of the protections which the right to prosecution by indictment was intended to confer. See Fed. R. Crim. P. 7 and 52(a).

The indictment disclosed the subject matter of the false statements with sufficient specificity to ensure that petitioner could successfully plead former jeopardy as a bar to any future prosecution for the same offense. *Russell* v. *United States*, 369 U.S. 749, 764. Moreover, it is undisputed that petitioner received actual notice prior to trial of the contents of the statements which underlay these charges, as well as the persons to whom and the dates on which the statements were alleged to have been made. His defense was not hampered by the omission from the indictment. The mere addition of the words "of a material fact" to the language of Counts 4 and 7 would not have aided petitioner in the preparation of his case for trial.[7] *Russell* v. *United States*, *supra*, 369 U.S. at 765-766.

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[6]The Second Circuit has held that "materiality" is not an element of the offense described by the clause of 18 U.S.C. 1001 under which petitioner was charged, and thus need not be alleged. *United States* v. *Silver*, 235 F. 2d 375, 377-378. But see *United States* v. *McGough*, 510 F. 2d 598, 602 (C.A. 5). For the reasons set out in the text (and in light of the concurrent sentence doctrine) there is no need to resolve that conflict in this case. The Fourth Circuit itself has taken the position that Section 1001 "proscribes only those falsifications which pertain to material facts" (*United States* v. *Zambito*, 315 F. 2d 266, 268), but evidently did not find that this required the reversal of petitioner's convictions.

[7]Before submitting the case to the jury, the court found that the alleged statements were material as a matter of law and so instructed the jury (Tr. 1775).

c. Petitioner finally contends (Pet. 29-33) that his fraudulent misrepresentations were not within the class of statements that 18 U.S.C. 1001 was intended to proscribe.

Congress intended 18 U.S.C. 1001 "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described" (*United States* v. *Gilliland*, 312 U.S. 86, 93). Among the functions assigned to the Drug Enforcement Administration is the licensing and registration of medical users of controlled substances in the United States. In aid of its regulatory jurisdiction, it has been empowered to conduct administrative inspections of "controlled premises" for the purpose of "inspecting, copying, and verifying the correctness of records, reports, or other documents required to be kept [by its registrants]" (21 U.S.C. 880(b)) and to suspend or revoke the registrations of those convicted of criminal violations of, *inter alia*, 21 U.S.C. 842 and 843. During a proper administrative inspection of his premises, petitioner repeatedly lied to agents about his use of cocaine in his veterinary practice and his compliance with the record-keeping requirements of 21 U.S.C. 827. Those statements inevitably tended to obstruct the Drug Enforcement Administration in the performance of its regulatory functions and were therefore well within the intended scope of 18 U.S.C. 1001.

Petitioner nevertheless urges that his statements were not properly punishable because they were "oral and unsworn" and were "merely answers to the inquiries of a Drug Enforcement Administration agent, and were devoid of any aggressive or voluntary aspect" (Pet. 31). It is established, however, that neither an oath (see *Neely* v. *United States*, 300 F. 2d 67, 71 (C.A. 9), certiorari denied, 369 U.S. 864) nor a writing (see *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46) is required under the statute. Nor does the fact that the statements were made in response to questions give

petitioner a right to lie or mislead.[8] Cf. *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976; *Bryson* v. *United States*, 396 U.S. 64.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioner seeks to bring his statements within the "exculpatory no" doctrine, a judicially created exception to the false statement provisions of 18 U.S.C. 1001. Even if the doctrine is valid, it does not aid petitioner. The doctrine distinguishes "negative exculpatory denial[s]" made in response to accusations of wrongdoing from "affirmative representation[s] of facts peculiarly within the knowledge of the suspect not otherwise obtainable by the investigator," and removes the former category of statement from the coverage of 18 U.S.C. 1001. *United States* v. *Bush*, 503 F. 2d 813, 818 (C.A. 5). But petitioner's statements to the agents were not mere exculpatory denials in the face of accusatorial interrogation. Rather, he offered elaborate fabrications in response to general inquiries concerning the amount of cocaine he used for medicinal purposes and the type of records he kept.